Supreme Court, U.S.
FILED
JAN 2 1996
CLERK

No. 95-266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CARRIE JAFFEE, as Special Administrator for RICKY ALLEN, SR.,

Petitioner,

v.

MARY LU REDMOND and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS

RICHARD N. WILLIAMS, ESQ.
Corporation Counsel
VILLAGE OF HOFFMAN ESTATES
1900 Hassell Road
Hoffman Estates, IL 60195
(708) 882-9100

GREGORY E. ROGUS, ESQ.
Counsel of Record
PAUL E. WOJCICKI, ESQ.
ROBERT E. WILENS, ESQ.
JENNIFER L. KELLY, ESQ.
SEGAL McCAMBRIDGE SINGER & MAHONEY, LTD.
Two First National Plaza
20 South Clark Street, Suite 700
Chicago, IL 60603
(312) 782-8300
Attorneys for Respondents

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

BEST AVAILABLE COPY

55 pp

QUESTIONS PRESENTED

I.

Whether the existence and scope of the psychotherapist/patient privilege recognized by the Seventh Circuit in this case comply with Rule 501 of the Federal Rules of Evidence?

II.

Whether the psychotherapist/patient privilege recognized by the Seventh Circuit under Rule 501 of the Federal Rules of Evidence should include confidential communications with clinical social workers rather than being limited to psychiatrists and clinical psychologists as provided in Proposed Rule of Evidence 504?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
RULE INVOLVED	2
STATEMENT	2
SUMMARY OF THE ARGUMENT	7
ARGUMENT	9

I.

THE PSYCHOTHERAPIST/PATIENT PRIVILEGE AS DEFINED AND DELIMITED BY THE SEVENTH CIRCUIT FULLY COMPORTS WITH BOTH THE EXPRESS LANGUAGE OF AND CONGRESSIONAL INTENT BEHIND RULE 501 9

A. The Contours Of The Privilege 9

1. The psychotherapist/patient privilege protects only confidential communications, i.e. all the information learned by the therapist or counselor during treatment that is necessary for treatment 10

2. The privilege may be claimed by the patient and by the therapist on behalf and in the interest of the patient ... 10

3. The privilege extends to mental health care workers including licensed clinical social workers engaged in psychotherapy 11

4. The privilege is not absolute. It requires an assessment of whether, in the interests of justice, the evidentiary need for disclosure outweighs the patient's privacy interest 12

B. The Existence And Scope Of The Privilege Is Consistent With The Principles Of The Common Law 13

C. Reason And Experience Compel Recognition Of The Privilege 18

1. The privilege serves important societal interests 18

2. The privilege protects an individual's right of privacy 26

3. Experience with the privilege has been favorable 28

4. Clinical social workers are psychotherapists. There is no rationale today for excluding their patients from the protection of the psychotherapist-patient privilege 30

II.

THE SEVENTH CIRCUIT CORRECTLY APPLIED THE PRIVILEGE UNDER THE FACTS AND CIRCUMSTANCES OF THE PRESENT CASE 35

CONCLUSION 39

TABLE OF AUTHORITIES

Cases	PAGE
Branzburg v. Hayes, 408 U.S. 632, 92 S. Ct. 2646 (1972)	18
Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. ___, 113 S. Ct. 2786 (1993)	13
Graham v. Connor, 490 U.S. 386 (1989)	36
Trammel v. United States, 445 U.S. 40 (1980)	12, 14, 17, 29
United States v. Gillock, 445 U.S. 360 (1980)	17, 29
United States v. Weber, 465 U.S. 792, 104 S. Ct. 1488 (1994)	17
Hancock v. Hobbs, 967 F.2d 462 (11th Cir. 1992)	14
In re Doe, 964 F.2d 1325 (2d Cir. 1992)	23, 29
In re Grand Jury Proceedings, 867 F.2d 562 (9th Cir. 1989)	14
In re Zuniga, 714 F.2d 632 (6th Cir. 1983), *cert. denied*, 464 U.S. 983 (1983)	10, 19, 22, 28
Jaffee v. Redmond, 51 F.3d 1346 (7th Cir. 1995), *cert. granted*, 116 S. Ct. 334 (1995)	*passim*
Memorial Hospital for McHenry County v. Shadur, 664 F.2d 1058 (7th Cir. 1981)	29, 39
Slaken v. Porter, 737 F.2d 368 (4th Cir. 1984)	14
United States v. Burtrum, 17 F.3d 1299 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 176 (1994)	14
United States v. Moore, 970 F.2d 48 (5th Cir. 1992)	14
Jennings v. D.H.K. Airlines, 101 F.R.D. 549 (N.D. Ill. 1984)	25, 28

United States v. D.F., 857 F. Supp. 1311, (D.C. Wis. 1994), *aff'd by* 63 F.3d 671 (7th Cir. 1995) and *reh'g denied*, (1995)	22

Statutes

Federal:	
Federal Rule of Evidence 501	*passim*
Proposed Federal Rule of Evidence 504	11, 15, 30, 33-34
Proposed Federal Rule of Evidence 506	27-28
38 U.S.C. § 7402(b)(9) (1991)	33
42 U.S.C. § 1395i-3(b)(5)(G) (1992 & Supp. 1995)	32
42 U.S.C. § 1395l(a)(1)(F) (1992 & Supp. 1995)	33
42 U.S.C. § 1395x(hh) (1992 & Supp. 1995)	32-34
42 U.S.C. § 1395x(s)(2)(N) (1992 & Supp. 1995)	32-33
42 U.S.C. § 1396r(b)(5)(G) (1992 & Supp. 1995)	32
State:	
Ala. Code § 13A-11-30, *et seq.* (1994)	26
Ala. Code § 34-26-2 (1991)	29
Ala. Code § 34-30-1 *et seq.* (1991 & Supp. 1995)	31
Alaska Const. Art. I, § 22 (1993)	26
Alaska Stat. § 08.86.200 (1991)	29
Alaska Stat. § 08.95.010 *et seq.* (1991)	31
Ariz. Const. Art. II, § 8 (1984)	26
Ariz. Rev. Stat. Ann. § 32-3283 (1992)	29
Ariz. Rev. Stat. Ann. § 32-3291 *et seq.* (1992)	31
Ark. Code Ann. § 17-39-101 *et seq.* (1992)	31

Ark. Code Ann. § 17-39-107 (1992) 29
Cal. Bus. & Prof. Code § 1012 (West 1990) 29
Cal. Bus. & Prof. Code § 4990 *et seq.* (West 1990) . 31
Cal. Const. Art. I, § 1 (West 1954) 26
Colo. Rev. Stat. § 12-43-401 *et seq.* (1991) 31
Colo. Rev. Stat. § 13-90-107 (1987 & Supp. 1995) . 29
Conn. Gen. Stat. Ann. § 20-195m *et seq.* (West 1958 & Supp. 1995) 31
Conn. Gen. Stat. Ann. § 52-146q (West Supp. 1995) 29
Del. Code Ann. tit. 24, § 3901 *et seq.* (1974 & Supp. 1994) 31
Del. Code Ann. tit. 24, § 3913 (1987) 29
D.C. Code Ann. § 2-3308.1 *et seq.* (1981) 31
D.C. Code Ann. § 14-307 (1995) 29
Fla. Const. Art. I, § 23 (West 1991) 26
Fla. Stat. Ann. § 90.503 (West 1979 & Supp. 1995) 29
Fla. Stat. Ann. § 491.002 *et seq.* (West 1991 & Supp. 1995) 31
Ga. Code Ann. § 24-9-21 (1995) 29
Ga. Code Ann. § 43-10A-1 *et seq.* (1994 & Supp. 1995) 31
Haw. Const. Art. I, § 7 (1988) 26
Haw. Rev. Stat. § 467 D-1 *et seq.* (1995) 31
Haw. Rev. Stat. § 467 E-1 (1995) 31
Haw. Rule 504.1 (1988) 29
Idaho Code § 54-3201 (1988) 31

Idaho Code § 54-3213 *et seq.* (1988) 29
Idaho Evidence Code § 9-203 (1988) 29
Ill. Const. Art. I, § 6 (Smith-Hurd 1993) 26
Ill. Const. Art. I, § 12 (Smith-Hurd 1993) 26
ILCS 225, 20/1 *et seq.* (Smith-Hurd 1993 & Supp. 1995) 31
ILCS 225, 20/16 (Smith-Hurd 1993) 29
ILCS 225, 20/3 (Smith-Hurd 1993) 31-32
ILCS 225, 20/9 (Smith-Hurd 1993) 31-32
ILCS 740, 110/1-110/17 (Smith-Hurd 1993 & Supp. 1995) 39
Ind. Code Ann. § 25-23.6-1-1 *et seq.* (Burns 1995) . 31
Ind. Code Ann. § 25-23.6-6-1 (Burns 1995) 29
Iowa Code Ann. § 154C.1 *et seq.* (1989) 31
Iowa Code Ann. § 622.10 (1950 & Supp. 1995) ... 29
Kan. Stat. Ann. § 65-6301 *et seq.* (1992 & Supp. 1994) 31
Kan. Stat. Ann. § 65-6315 (1992) 29
Ky. Rev. Stat. Ann. § 335.010 *et seq.* (Michie 1990 & Supp. 1994) 31-32
Ky. Rule of Evid. 507 (Michie 1992) 29
La. Code of Evid. 510 (West 1995) 29
La. Const. Art. I, § 5 (West 1977) 26
La. Rev. Stat. Ann. § 37:2701 *et seq.* (West 1988 & Supp. 1995) 31
Me. Rev. Stat. Ann. tit. 17-A, § 432 (West 1983 & Supp. 1995) 26

Me. Rev. Stat. Ann. tit. 17-A, § 483 (West 1983 & Supp. 1995) 26
Me. Rev. Stat. Ann. tit. 17-A, § 511 (West 1983) . 26
Me. Rev. Stat. Ann. tit. 32, § 7001 *et seq.* (West 1964 & Supp. 1995) 31
Me. Rev. Stat. Ann. tit. 32, § 7005 *et seq.* (West 1988) 29
Me. Rev. Stat. Ann. tit. 34-B, § 3003 (West 1988 & Supp. 1995) 26
Md. Code Ann. C.J. § 9-121 (1995) 29
Md. Code Ann. Health Occ. § 19-101 *et seq.* (West 1994) 32
Mass. Gen. Laws Ann. ch. 112, § 130 *et seq.* (West 1996) 32
Mass. Gen. Laws Ann. ch. 112, § 135A (West 1996) 29
Mich. Stat. Ann. § 18.425 (1601) *et seq.* (1995) ... 31
Mich. Stat. Ann. § 18.425 (1610) (1995) 29
Minn. Stat. Ann. § 148B.01 *et seq.* (West 1989 & Supp. 1995) 32
Minn. Stat. Ann. § 198.33 (West 1992 & Supp. 1995) 26
Minn. Stat. Ann. § 595.02(g) (West 1988 & Supp. 1995) 29
Miss. Code Ann. § 73-53-1 *et seq.* (1972) 32
Miss. Code Ann. § 73-53-29 (1995) 29
Mo. Ann. Stat. § 337.600 *et seq.* (Supp. 1996) .. 32
Mo. Ann. Stat. § 337.636 (Supp. 1996) 29

Mont. Code Ann. § 37-22-101 *et seq.* (1993 & Supp. 1994) 32
Mont. Code Ann. § 37-22-401 *et seq.* (1993 & Supp. 1994) 29
Mont. Const. Art. II, § 10 (1994) 26
Neb. Rev. Stat. § 20-202 (1991) 26
Neb. Rev. Stat. § 71-1, 295 *et seq.* (Supp. 1993) . 32
Neb. Rev. Stat. § 71-1, 335 29
Neb. Rev. Stat. § 81-673 (Supp. 1993) 26
Nev. Rev. Stat. § 49.215 (Michie 1986) 29
Nev. Rev. Stat. § 49.225 (Michie 1986) 29
Nev. Rev. Stat. § 49.235 (Michie 1986) 29
Nev. Rev. Stat. § 641B.010 *et seq.* (Michie 1991 & Supp. 1993) 32
N.H. Rev. Stat. Ann. § 330-A:1 *et seq.* (1995) ... 32
N.H. Rev. Stat. Ann. § 330-A:19 (1995) 29
N.J. Rev. Stat. § 45:15BB-1 *et seq.* (West 1995) . 32
N.J. Rev. Stat. § 45:15BB-13 (West 1995) 29
N.M. Stat. Ann. § 61-31-1 *et seq.* (Michie 1993) .. 32
N.M. Stat. Ann. § 61-31-24 (Michie Supp. 1995) .. 29
N.Y. Civ. Rights Law § 50 (West 1996) 26
N.Y. Educ. Law § 7700 *et seq.* (McKinney 1985) . 31
N.Y. Evid. Code § 4508 (McKinney 1978 & Supp. 1993) 29
N.C. Gen. Stat. § 8-53.7 (Michie 1995) 29
N.C. Gen. Stat. § 90B-1 *et seq.* (1991 & Supp. 1995) 32

N.D. Cent. Code § 43-41-01 *et seq.* (1993 & Supp. 1995) 32
N.D. Evid. Code § 503 (Supp. 1995) 29
Ohio Rev. Code Ann. § 2317.02 (Baldwin 1994 & Supp. 1995) 29
Ohio Rev. Code Ann. § 4757.01 *et seq.* (Baldwin 1995) 32
Okla. Stat. Ann. tit. 21, § 839.1 (West 1983) ... 26
Okla. Stat. Ann. tit. 59, § 1250 *et seq.* (West 1989 & Supp. 1996) 31
Okla. Stat. Ann. tit. 59, § 1261.6 (West 1989) .. 29
Or. Evid. Code § 40.250 (1988) 29
Or. Rev. Stat. Ann. § 675.510 *et seq.* (1989 & Supp. 1994) 32
Pa. Stat. Ann. tit. 63, § 1901 *et seq.* (Supp. 1995) . 32
Pa. Cons. Stat. tit. 23, § 6116 29
Pa. Cons. Stat. tit. 42, § 5945.1 29
R.I. Gen. Laws § 5-37.3-3, 4 *et seq.* (1995) 29
R.I. Gen. Laws § 5-39.1-1 *et seq.* (1995) 31
S.C. Code Ann. § 19-11-95 (Supp. 1994) 29
S.C. Code Ann. § 40-63-10 *et seq.* (1986 & Supp. 1994) 31
S.D. Codified Laws § 22-21-1 (1988) 26
S.D. Codified Laws § 36-26-1 *et seq.* (1990 & Supp. 1995) 32
S.D. Codified Laws § 36-26-30 (1986 & Supp. 1995) . 29

Tenn. Code Ann. § 63-11-213 (1990) 29
Tenn. Code Ann. § 63-23-101 *et seq.* (1990 & Supp. 1995) 32
Tex. Hum. Res. Code Ann. § 50.001 *et seq.* (West 1990 & Supp. 1996) 32
Tex. Rules Civ. Evid. 510 (West Supp. 1995) .. 29
Utah Code Ann. § 58-60-114 (Supp. 1995) 29
Utah Code Ann. § 58-60-201 *et seq.* (Supp. 1995) . 31
Utah Code Ann. § 76-9-401 *et seq.* (1995 & Supp. 1995) 26
Vt. Rule Evid. 503 (1983 & Supp. 1995) 29
Vt. Stat. Ann. tit. 26, § 3201 (1994) 32
Va. Code Ann. § 8.01-400.2 (Michie 1992) 29
Va. Code Ann. § 54.1-3700 *et seq.* (Michie 1994) . 31
Wash. Rev. Code Ann. § 18.19.010 *et seq.* (West 1989 & Supp. 1995) 32
Wash. Rev. Code Ann. § 18.19.180 (West 1989 & Supp. 1995) 29
W. Va. Code § 30-30-1 *et seq.* (1993 & Supp. 1995) . 32
W. Va. Code § 30-30-12 *et seq.* (1993 & Supp. 1995) 29
Wis. Const. Art I, § 9m (1986) 26
Wis. Stat. Ann. § 457.01 *et seq.* (Supp. 1995) ... 32
Wis. Stat. Ann. § 895.50 (1983 & Supp. 1995) .. 26
Wis. Stat. Ann. § 905.04 (1993 & Supp. 1995) .. 29
Wyo. Stat. Ann. § 33-38-101 *et seq.* (Supp. 1995) . 32
Wyo. Stat. § 33-27-123 (Michie Supp. 1995) 29

***Other American Jurisdictions*:**

P.R. Laws Ann. tit. 20, § 821 *et seq.* (1988) ... 32

V.I. Code Ann. tit. 27, § 531 *et seq.* (1993) 32

Legislative History

Communication from the Chief Justice of the United States Transmitting the Proposed Rules of Evidence of the United States Courts and Magistrates, H.R. Doc. No. 46, 93d Cong., 1st Sess. (1973) 14-15

Proposed Rules of Evidence, H.R. Rep. No. 650, 120 Cong. Rec. H. 12,253 (1973), *reprinted in*, 1984 U.S.C.C.A.N. 7051 16

Proposed Rules of Evidence: Presentation of the Conference Report on H.R. 5463, 120 Cong. Rec. H. 12, 553 (1974), *reprinted in*, 1984 U.S.C.C.A.N. 7051 15-16

Proposed Rules of Evidence, S. Rep. No. 1277, 93d Cong., 2d Sess. (1974), *reprinted in*, 1984 U.S.C.C.A.N. 7051 16-17

Proposed Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal Justice & the House Comm. on the Judiciary, 93d Cong., 1st Sess. (1973) 16

Other Authority

26 Wright & Graham, *Fed. Prac. & Proc.: Evidence*, 9-10 (1992 ed.) 28

Journal Articles

Comment *Evidence: The Psychotherapist-Patient Privilege Under Federal Rule of Evidence 501*, 23 Washburn L.J. 706 (1984) 19, 27

Comment *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 Cal. L. Rev. 1050 (1973) 33, 34-35

Developments in the Law-Privileged Communications, 98 Harv. L. Rev. 1450 (1985) 10, 26, 27, 31, 33, 34-35

Domb, *I Shot the Sheriff, But Only My Analyst Knows: Shrinking the Psychotherapist-Patient Privilege*, 5 J.L. & Health 209 (1990) 27

Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis and the Contextual Synthesis*, 73 Neb. L. Rev. 511 (1994) 13, 14, 15, 17

McGuire, Graves & Blau, *Depth of Self-Disclosure as a Function of Assured Confidentiality and Videotape Recording*, 64 J. Counseling & Dev. 259 (1985) 24

Note, *The Social Worker-Client Relationship and Privileged Communications*, 1965 Wash. U. L.Q. 362 ..... 24, 34

Nowell & Spruill, *If Its Not Absolutely Confidential, Will Information Be Disclosed?*, 24 Prof. Psychology: Res. & Practice 367 (1993) 24-25

Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175 (1960) . 22-23

Smith, *Constitutional Privacy in Psychotherapy*, 49 Geo. Wash. L. Rev. 127 (1980) 19

Soffin, *The Case for a Federal Psychotherapist-Patient Privilege That Protects Patient Identity*, 1985 Duke L. Rev. 1217 10

Stroube, *The Psychotherapist-Patient Privilege, Are Some Patients More Privileged Than Others?*, 10 Pac. L.J. 801 (1979) 12, 34-35

Taub & Elwork, *Researching The Effects of Confidentiality Law on Patients' Self-Disclosures*, 21 Prof. Psychol.: Res. & Prac. 72 (1990) ... 24

Other Publications

Am. Heritage Dictionary, 1463 (3d ed. 1992) ... 22

Bohl, *The Effectiveness of Brief Psychological Interventions in Police Officers after Critical Incidents*, in Critical Incidents in Policing, Revised, 31 (Reese, Horn & Dunning, eds., 1991) . 19-20

Dunning, *Mitigating the Impact of Work Trauma: Administrative Issues Concerning Intervention*, in *Critical Incidents in Policing, Revised*, 73 (Reese, Horn & Dunning, eds., 1991) 23, 25-26

Fuller, *An Overview of the Process of Peer Support Team Development*, in *Critical Incidents in Policing, Revised*, 99 (Reese, Horn & Dunning, eds., 1991) 25

McMains, *The Management and Treatment of Post-shooting Trauma: Administration and Programs*, in Critical Incidents in Policing, Revised, 191 (Reese, Horn & Dunning, eds., 1991) ... 20

Ostrov, *Critical Incident Psychological Casualty Among Police Officers: A Clinical Review*, in *Critical Incidents in Policing, Revised*, 251 (Reese, Horn & Dunning, eds., 1991) 20

Silva, *The Delivery of Mental Health Services to Law Enforcement Officers*, in *Critical Incidents in Policing, Revised*, 335 (Reese, Horn & Dunning, eds., 1991) 20-22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CARRIE JAFFEE, as Special Administrator for RICKY ALLEN, SR.,

Petitioner,

v.

MARY LU REDMOND and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet.App. 1-24) is reported at 51 F.3d 1346. The court of appeals' denial of the petition for rehearing and suggestion for rehearing en banc (Pet.App. 26) is unreported. The relevant oral rulings and memorandum opinion of the district court (Pet.App. 27-66) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1995. The petition for rehearing was denied on May 12, 1995. The petition for a writ of certiorari was filed on August 10, 1995 and granted on October 16, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

This case involves Rule 501, Federal Rules of Evidence, 28 U.S.C., which is set forth verbatim at Page 3 of the Brief for Petitioner.

STATEMENT

On June 27, 1991, Hoffman Estates police officer Mary Lu Redmond was dispatched to the Canyon Estates Apartment Complex regarding a reported fight in progress. Shortly after arriving there, the officer observed a group of men near the building entrance, one of whom was holding a pipe. She then saw two men run out of the building and onto the lawn. The second man, Ricky Allen Sr., was armed with a knife and was chasing, and gaining on, the other man. She shouted for him to drop the knife. Within seconds, when it appeared to her that Allen was about to stab the other individual, the officer shot and killed him.

The plaintiffs brought a three-count complaint contending that the officer had no lawful reason to shoot, since, in their view, Allen was unarmed and was not in any position of causing death or bodily harm to anyone else. Count I alleged that Redmond's actions violated the decedent's federal constitutional right not to be subjected to unreasonable seizures nor to be deprived of life without due process of law. Count II alleged that Redmond's actions were wilful and wanton, thereby entitling the decedent's next-of-kin to damages under Illinois' wrongful death statute. The last count alleged that Redmond deprived Ricky Allen's children of their federal constitutional right to associate with their father. (App. 8-12) Plaintiffs never amended their complaint. They abandoned their third claim at trial. (R. 167 at p. 665)

During the course of pretrial discovery, plaintiffs' attorney sought to discover the content of numerous conversations between Redmond and Karen Beyer, a licensed clinical social worker to whom Redmond went for counseling following the shooting. Beyer held the position of Director of Health and Human Services for the Village of Hoffman Estates. All of Officer Redmond's conversations with Karen Beyer after June 27, 1991 took place during these counseling sessions. (App. 18) The plaintiffs initially inquired directly of Redmond at her deposition regarding the content of the counseling sessions. The defendant refused, however, contending that any such communications were privileged. (R. 64, 65) Plaintiffs then directed a subpoena to Beyer to testify at deposition and to produce her curriculum vitae and "all notes, records, reports pertaining to Mary Lu Redmond." (R. 64, Exh. A) Defendants moved to quash the subpoena, contending, once again, that any conversations occurring within the context of the counseling relationship, as well as any corresponding records, notes, or reports, were privileged under both state and federal law. (App. 16-28) The district court denied defendants' motion. (R. 67, 119-1) The plaintiffs then moved for an order to compel Redmond to

appear for a third deposition session to answer questions about her conversations with Beyer. (App. 31) Over defendant's objection (App. 33), the court granted plaintiffs' motion. (R. 73, 117-1) This followup deposition then proceeded in the presence of a magistrate judge on May 11, 1992. (R. 78)

On June 23, 1992, Karen Beyer, through her attorney, filed a motion for reconsideration of the district court's previous rulings on the privilege issue. (App. 36) The defendants orally joined in this motion. (R. 117-2 at p.6) After the court denied this motion (R. 82, 117-2), Beyer was deposed. Plaintiffs' counsel then brought a motion to compel Beyer to answer certain questions to which objections had been made and to produce certain notes and documents. (App. 62) On September 30, 1992, the court granted this motion. (R. 92) Plaintiffs next moved the court for sanctions against Redmond, contending that her deposition answers relating to her conversations with Beyer were evasive and incomplete. Specifically, the plaintiffs sought an order barring Officer Redmond from testifying at trial. (App. 64) On December 10, 1992, the court held an evidentiary hearing, at which Redmond testified. (R. 106, 119-2) The court ruled that plaintiffs' counsel would be given further opportunity to depose Beyer and to review her notes. (R. 119-2 at pp. 41-54) Following this second installment of Beyer's deposition on January 26, 1993, plaintiffs then filed a second motion to compel Karen Beyer to answer certain questions. Specifically, plaintiffs requested an order permitting unrestricted inquiry into statements made by Redmond to Beyer and requiring the production of all of Beyer's notes. (App. 70) The court granted this motion on February 5, 1993. (R. 112, App. 73-74)

Plaintiffs next filed a motion for sanctions against the defendant contending that she had instructed Beyer to refuse to comply with the court's February 5, 1993 order. (App. 75) An evidentiary hearing was held on March 8, 1993, at which both Redmond and Beyer testified. (R. 114, 119-4) After the parties submitted written briefs as requested by the court (R. 119-4 at pp. 49-51; R. 121-126, 128), Judge Shadur granted plaintiffs' motion on April 6, 1993, ordering that Officer Redmond would be precluded from testifying at trial regarding her version of the event "because plaintiffs' attorneys have been blocked from effective cross-examination." The court also referred the matter of Beyer's non-compliance to the U.S. Attorney's Office for possible criminal contempt proceedings. (R. 129, 130, 139) The case was then set to commence trial on December 13, 1993. (R. 136)

On December 8, 1993, defendants filed a motion to reconsider and to vacate the court's order barring Redmond from testifying at trial. (App. 77) By this time, there had been no finding of contempt entered by any judicial officer against Karen Beyer following the district court's referral order. (App. 80) On December 10, 1993, the court granted defendants' motion, but with the proviso that the jury would be informed that it could draw an inference that the records, notes, and documents which had not been produced by Beyer would have contained information unfavorable to the defendants. (R. 143; App. 83-90)

At trial, the plaintiffs called Redmond as a witness during their case-in-chief and, over the standing objection of the defendant, (App. 91-95) interrogated her with regard to her conversations with Beyer. (App. 100-109) Plaintiffs' counsel also called Beyer as a witness, and,

once again over defendants' objection, examined her about the conversations as well as her notes and records. (App. 111-122)

At the jury instruction conference held on December 20, 1993, defendant objected to the court giving plaintiffs' instruction No. 8, which discounted Ms. Beyer's self-reference as a therapist, informed the jury that there is no legal justification to refuse to produce Ms. Beyer's notes of her conversations with Ms. Redmond, that such refusal was unjustified, and that they were, under the circumstances, entitled to presume that the contents of those notes would be unfavorable to both Redmond and to the Village. (R. 167 at pp. 630-636; Pet. App. 67, 68)

The jury returned its verdict on December 22, 1993, awarding the plaintiffs $45,000.00 on Count I (the federal constitutional violation) and $500,000.00 on Count II (the state wrongful death claim). Judgment was entered the same day.

On defendants' appeal, the Seventh Circuit, in agreement with the Second and Sixth, found that reason and experience compel recognition of a psychotherapist/patient privilege under Rule 501 of the Federal Rules of Evidence. The court noted that psychotherapists and patients share a unique relationship in which the patient's ability to communicate freely without fear of public disclosure is the key to successful treatment. (51 F.3d at 1355, 1356) The court found further justification for the privilege in its protection for an individual's right of privacy (Id. at 1356) and observed that experience with the privilege has been favorable, as evidenced by its widespread recognition in all fifty states. (Id. at 1356, 1357) The privilege extends to mental health care providers other than psychiatrists and psychologists, including licensed clinical social workers, since drawing a distinction between counseling provided by costly psychotherapists and that provided by more readily available social workers serves no discernible public purpose. (Id. at 1358, n. 19) Under the facts and circumstances of this case, the court determined that the interests served through recognition and application of the privilege outweighed any countervailing interests. (Id. at 1357) Accordingly, the Seventh Circuit held that the district court had erred in refusing to recognize that privilege and in requiring disclosure of the content of any of the counseling conversations between Officer Redmond and Karen Beyer. The court reversed and remanded the case for new trial.

SUMMARY OF ARGUMENT

The psychotherapist-patient privilege recognized by the Seventh Circuit fully comports with Rule 501 of the Federal Rules of Evidence. It is carefully delimited to protect confidential communications that are necessary for successful psychotherapeutic treatment. The privilege is neither absolute nor unqualified, but instead requires courts to determine whether, in the interests of justice, the evidentiary need for disclosure outweighs the patient's privacy interests and related, concomitant societal interests.

In recognizing the privilege, the Seventh Circuit adhered to this Court's view that Rule 501 was not intended by Congress to freeze the law of privilege, but rather to provide the courts with flexibility to develop rules of privilege based on reason and experience, a read-

ing that is clearly consistent with the rule's language and history.

Mindful of its responsibility under the rule to look to reason and experience, the appeals court correctly observed that the privilege serves significant societal as well as individual interests, such as the need for privacy and confidentiality in the psychotherapist/patient relationship and the societal benefits derived from encouraging citizens, including law enforcement personnel, who are subject to psychological trauma to seek healing. The court took into consideration the ongoing evolution of the mental health care system and developments within its interrelated professional components. The court also noted that the privilege had gained widespread recognition under state law.

The Seventh Circuit carefully and thoughtfully balanced the interests involved and correctly concluded that where, as here, ample sources of relevant evidence already exist, the societal and individual interests served by honoring the confidential and private nature of the psychotherapist/patient relationship outweighed the public interest in securing every man's evidence.

ARGUMENT

I.

THE PSYCHOTHERAPIST/PATIENT PRIVILEGE AS DEFINED AND DELIMITED BY THE SEVENTH CIRCUIT FULLY COMPORTS WITH BOTH THE EXPRESS LANGUAGE OF AND CONGRESSIONAL INTENT BEHIND RULE 501.

A. The Contours Of The Privilege.

Consistent with its authority under Rule 501 of the Federal Rules of Evidence, the Seventh Circuit determined in this case that reason and experience justified the recognition and application of a psychotherapist-patient privilege. The court premised its holding upon sound policy considerations implicating important societal interests as well as individuals' concerns, and rights, of privacy. In this appeal, Petitioner requests this Court to undo a ruling that rests upon the principles of the common law, compelling reason, and the wisdom of experience. Given the bases and support for the Court of Appeals' ruling, this Court should decline Petitioner's invitation, and instead, affirm that ruling.

Central to an analysis of the legality of the privilege is an understanding and appreciation of its contours. Contrary to a recurrent theme of Petitioner's presentation, the Seventh Circuit's ruling was neither "absolute" (Pet. Br. 26) nor unjustifiably "broad." (Pet. Br. 11-13, 21-22, 25, 31) Instead, the court articulated certain parameters which firmly ground the privilege upon reason and experience and do no violence to the principles of the common law.

1. The psychotherapist/patient privilege protects only confidential communications, i.e. all the information learned by the therapist or counselor during treatment that is necessary for treatment.

Drawing upon the enlightened reasoning of the Sixth Circuit in *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983) and the thorough analysis provided in *Developments in the Law: Privileged Communications*, 98 Harv. L. Rev. 1450 (1985), the Seventh Circuit specifically tied its recognition of both the existence and scope of a psychotherapist/patient privilege to the confidential communications attendant to the psychotherapeutic relationship. 51 F.3d at 1356, 1357 n. 18. These "communications" include any information gained by the psychotherapist during treatment, either verbally or through observation of the patient. "Confidential" communications are only those necessary for treatment. (98 Harv. L. Rev. at 1540-41; cf. Proposed Rule 504(a)(3), set forth in Petitioner's Addendum.) Inasmuch as Respondents did not argue that the privilege should preclude disclosure of Officer Redmond's identity as a patient or client of Karen Beyer, the court did not address that aspect. (See App. 16-28; cf. Soffin, *The Case for a Federal Psychotherapist-Patient Privilege that Protects Patient Identity*, 1985 Duke L. Rev. 1217.)

2. The privilege may be claimed by the patient and by the therapist on behalf and in the interest of the patient.

The court did not restrict the right to claim the privilege solely to the patient. Rather, it may be invoked by the therapist as well, provided the therapist's claim is made on behalf and in the interest of the patient. This feature naturally follows from the core of the privilege,

which is to protect the confidential communications between the two. The court was guided by state law, namely the Illinois Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1 *et seq.*, and in particular §110/10. *See* 51 F.3d 1346, 1357 (7th Cir. 1995). Though not specifically referenced by the court as such, its formulation also apparently squares with the language of Proposed Rule of Evidence 504(c).[1]

3. The privilege extends to mental health care workers including licensed clinical social workers engaged in psychotherapy.

Whereas the district court and the Petitioner have placed undue emphasis throughout this case on the title of the therapist involved,[2] the Court of Appeals did not succumb to this unwarranted restriction, noting that in today's world, professionals with quite a variety of job titles and descriptions provide mental health care to patients. The court maintained its focus upon the psychotherapeutic function as the foundation of the relation-

---

[1] For reasons which follow in this brief, Respondents do not concede nor advocate the Petitioner's argument that the privilege, if any, should be restricted only to psychiatrists and psychologists, as the text of 504 provides. (Pet. Br. 39) The present references to 504 simply illustrate that the appeals court's present ruling does not represent a radical undertaking.

[2] R. 119-1 (Transcript of Proceedings 3/26/92) at pp. 4-8, 11; Pet. App. 48, 49 (Ruling of 6/23/92); App. 92 (ruling on objection at trial); Pet. App. 67 (charge to jury).

ship,[3] and observed that drawing distinctions between counseling provided by costly psychotherapists and counseling provided by more readily accessible social workers serves no discernible purpose. 51 F.3d at 1358, n. 19.

4. The privilege is not absolute. It requires an assessment of whether, in the interests of justice, the evidentiary need for disclosure outweighs the patient's privacy interest.

Perhaps the most forceful rebuttal to Petitioner's urgings on the breadth of the privilege is the explicit requirement for balancing the evidentiary need for the disclosure of the contents of psychotherapy/counseling sessions against the patient's privacy interests. 51 F.3d at 1357. Here, the Seventh Circuit followed this Court's lead in *Trammel v. United States*, 445 U.S. 40 (1980): testimonial exclusionary rules and privileges must be ". . . accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.' " 445 U.S. at 50. The question is, ". . . whether the privilege . . . promotes sufficiently important interests to outweigh the need for probative evidence in the administration of . . . justice." 51 F.3d at 1357, citing *Trammel*, 445 U.S. at 52. The Appeals Court here carried out its balancing within the factual confines of the present case, and declined to speculate as to what other

[3] Stroube, *The Psychotherapist-Patient Privilege: Are Some Patients More Privileged Than Others?*, 10 Pac. L. J. 801, 820 (1979).

situations would call for abrogation of the privilege. 51 F.3d at 1357.

B. The Existence And Scope Of The Privilege Is Consistent With The Principles Of The Common Law.

To determine whether a psychotherapist/patient privilege can be reconciled with the meaning and intent of Rule 501, ordinary rules of statutory construction dictate that the language of the rule itself be examined first. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. ____, 113 S. Ct. 2786, 2793 (1993) ("We interpret the legislatively enacted Federal Rules of Evidence as we would any statute."); Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rules of Evidence 501: The Restrictive Thesis, The Expansive Antithesis, and the Contextual Synthesis*, 73 Neb. L. Rev. 511, 536 (1994) (hereinafter "Imwinkelried at ____"). Professor Imwinkelried's thorough analysis of the rule's text (Imwinkelried at 525-536) points out that Rule 501 uses the word "principles," not "rules" or "privileges." "Principles" normally denotes a proposition at a higher level of generality than a mere rule. The text of many other Federal Rules uses the expression "rules." Rule 501 itself includes the term "rule" elsewhere in its text. Congress' selection of the term "principles" presumably indicates that it meant something other than the common-law privilege rules in effect at the time of the adoption of the Federal Rules. When a legislature uses different terms, it is normally assumed that the legislature meant different things. It would have been a simple matter for the drafters of Rule 501 to state that federal privilege questions would be governed by "common-law rules" or "privileges recognized at common-law." Congress' ultimate

choice of wording is, therefore, at odds with the notion that Congress intended to confine the courts to privileges which were settled fixtures at common law. Furthermore, the language of Rule 501 contains neither express prohibition against, nor express discouragement of, recognition of new privileges.[4] This contrasts with other evidentiary rules upon which Congress did engraft "explicit biases." (Imwinkelried at 528, 529)

Here, while the Petitioner has considered part of Professor Imwinkelried's presentation (Pet. Br. 17-19), she has studiously avoided discussion of this textual analysis. Petitioner's reliance upon cases from other circuits in suggesting that Rule 501 limits the courts to recognizing "only privileges that existed at common law" (Pet. Br. 20, n. 28; Pet. Writ 7, 8) is equally deficient, given the absence of any meaningful analysis of the Rule's language in those reported decisions.[5]

Also contrary to Petitioner's view, the legislative history of Rule 501 amply supports the connection between the privilege and "the principles of the common law." In fashioning the proposed rules to be forwarded to the Congress, the Judicial Conference's Advisory Committee had observed that the common law had ". . . indicated a disposition to recognize a psychotherapist-patient privilege . . . when legislatures began moving into the field." *Communication from the Chief Justice of the United States Transmitting the Proposed Rules of Evidence of the United States Courts and Magistrates*, H.R. Doc. No. 46, 93d Cong., 1st Sess., at 83 (1973). Upon reaching Congress, the proposed rules were submitted to the Special Committee on Reform of Federal Criminal Laws of the House Judiciary Committee, chaired by Representative Hungate. (Imwinkelried at 519, 520.) The Committee deleted the specific privilege proposals contained in Rules 502-513, which included a psychotherapist/patient provision (Rule 504), and substantially modified Rule 501, thereby prompting the chairman's remark, referenced in Petitioner's Brief, at p. 16, that ". . . The House rule on privilege is intended to leave the Federal law of privilege where we found it." Petitioner has overlooked, however, the chairman's comments immediately following:

> ". . . The federal courts are to develop the law of privilege on a case-by-case basis.
>
> "Rule 501 is not intended to freeze the law of privilege as it now exists. The phrase 'governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience,' is intended to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis. For example, the Supreme Court's rules of evidence contained no rule of privilege for a newspaperperson. The language of Rule 501 permits the courts to develop a privilege for newspaper-people on a case-by-case basis. The language cannot be interpreted as a congressional expression in favor of having no such privilege, nor can the conference action be interpreted as denying to

---

[4] Correspondingly, Rule 501 does not expressly prohibit or discourage the modification of longstanding rules. In *Trammel*, for example, this Court modified the witness-spouse privilege, despite its common law origins and lengthy history. 445 U.S. 40, 43-53.

[5] *See Slaken v. Porter*, 737 F.2d 368, 377 (4th Cir. 1984); *United States v. Moore*, 970 F.2d 48, 50 (5th Cir. 1992); *In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir. 1989); *United States v. Burtrum*, 17 F.3d 1299, 1301-02 (10th Cir. 1994); *Hancock v. Hobbs*, 967 F.2d 462, 466 (11th Cir. 1992).

> newspeople any protection they may have from State newsperson's privilege laws."

Proposed Rules of Evidence: Presentation of the Conference Report on H.R. 5463, 120 Cong. Rec. H. 12,253 (1974), *reprinted in* 1984 U.S.C.C.A.N., 7051, 7110. Noted witnesses urged Congress to authorize the courts to use the common law evolutionary method to develop privilege doctrine. Professor Louisell, for example, wrote: ". . . The law of privilege seems especially to profit from the common law evolutionary method, wise solution of specific problems being uniquely dependent on facts . . ." Professor Black commented: ". . . I think your deletion of all the specific Rules, coupled with the addition of your general Rule (as Rule 501) will conduce to the wisest possible development of the subject for the time being. You leave it entirely open to the Supreme Court to develop the law of privilege from time to time in conformity to its judgment as to the requirements of the law of privacy, that is now a part of recognized constitutional law. Even more important, perhaps, you allow the court (and the lower courts) to develop privilege rules appropriately recognizing the great value of human privacy . . ." *Proposed Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., at 192, 242 (1973). The ensuing House Report commented that ". . . *privileges shall continue to be developed* by the courts of the United States . . ." *Proposed Rules of Evidence: House Report No. 650*, 120 Cong. Rec. H. 12,253, at 7082 (1973), *reprinted in* 1984 U.S.C.C.A.N. 7051, 7082.

The Senate Judiciary Committee noted its agreement with the House's action ("The committee agrees with the main thrust of the House amendment that a federally developed common law based on *modern* reason and experience shall apply . . .") (emphasis added), and, in response to specific concerns raised over the deletion of Rule 504, declared:

> "It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient . . . or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case by case basis."

Proposed Rules of Evidence, S. Rep. No. 1277, 93d Cong. 2d Sess. (1974) *reprinted in* 1984 U.S.C.C.A.N. 7051, 7058, 7059.

Thus, the legislative history clearly indicates that Congress' use of the term "principles of the common law" in Rule 501 was not intended to refer to a static set of common-law privilege rules, but rather to a dynamic methodology that the courts could use to evolve privilege doctrine, including that pertinent to the psychotherapist-patient realm. (Imwinkelried at 526.)

This Court has declared that, ". . . In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege in a case-by-case basis' . . . and to leave the door open to change." *Trammel*, 445 U.S. at 47; *see also United States v. Gillock*, 445 U.S. 360, 367 (1980); *United States v. Weber*, 465 U.S. 799, 104 S. Ct. 1488, 1495 n. 25 (1984). While, as Petitioner has pointed out, this Court has declined to recognize certain other privileges in other contexts and which

touch upon interests not implicated here, most notably the administration of criminal justice, the Court only did so after judging each asserted claim to privilege on its facts and striking a proper balance between the interests there involved. *Branzburg v. Hayes*, 408 U.S. 632, 92 S. Ct. 2646, 2671 (1972) (Powell J., concurring).

Based upon the foregoing, the Seventh Circuit's recognition of a psychotherapist/patient privilege is firmly rooted in the ongoing evolutionary nature of the common law, as required by Rule 501. Neither the language nor the intent of the rule evidence any directive from the Congress to the courts to confine themselves solely to pre-1970s reason and experience in addressing privilege issues in the 1990s and beyond.

C. Reason And Experience Compel Recognition Of The Privilege.

1. The privilege serves important societal interests.

Society has an interest in promoting and maintaining the mental health and high functioning of its citizenry. There is widespread concern over joblessness and homelessness, impairment of productivity of workers, and the social and economic costs of mental and emotional disturbance or lack of well being. Violence and crime, as the court specifically noted (51 F.3d at 1355, n. 16), have become all too prevalent, leaving in their wake countless victims who either directly or indirectly bear the psychological and emotional consequences. Individuals such as these need and deserve the help, support, and emotional release provided by counseling and psychotherapy. The inability to obtain effective psychotherapeutic treatment may preclude the enjoyment and exercise of many fundamental freedoms. Mental illness may prevent one from understanding religious and political ideas, or interfere with the ability to communicate ideas. Some level of mental health is necessary to be able to form belief and value systems and to engage in rational thought. *In re Zuniga*, 714 F.2d 632, 639 (6th Cir. 1983), *citing* Smith, *Constitutional Privacy in Psychotherapy*, 49 Geo. Wash. L. Rev. 127 (1980). The interest of the patient in exercising his rights is also society's interest, for society benefits from its members' active enjoyment of their freedom. Moreover, society has an interest in successful treatment of mental illness because of the possibility that a mentally ill person will pose a danger to the community. *Zuniga*, 714 F.2d at 639. Accordingly, society has an interest in encouraging its members to seek qualified mental therapy when necessary. *See* Comment, *Evidence: The Psychotherapist-Patient Privilege Under Federal Rule of Evidence 501*, 23 Washburn L.J. 706, 712 (1984).

The present case suggests a more particularized, though correlating, societal interest in promoting and maintaining the mental health and functioning of its law enforcement officers. A major hazard involved in being a police officer is the possibility of being involved in traumatic or critical incidents, incidents in which human lives are lost and/or serious injuries are witnessed. Involvement in such episodes is highly stressful. It is not simply that stress symptoms occur but that they may appear with a long time delay. Specific symptoms include guilt, anxiety, depression, sleep disturbances, flashbacks, and excessive anger. The effects of these stress symptoms can be devastating, both at a personal and a professional level. *See* Bohl, *The Effectiveness of Brief Psychological Interventions in Police Officers After Critical*

Incidents, in Critical Incidents in Policing, Revised, 31 (Reese, Horn, & Dunning, eds., 1991) (hereinafter "*Critical Incidents*"); Ostrov, *Critical Incident Psychological Casualties Among Police Officers: A Clinical Review, Critical Incidents*, 251. Any situation that reminds an officer of his/her own limits and that overwhelms his/her ability to cope with that insight can be traumatic. It brings home to an officer the fact that he is not in total control of every situation, and reminds an officer that he is not invulnerable. McMains, *The Management and Treatment of Postshooting Trauma: Administration and Programs, Critical Incidents*, 191.

The police officer's plight is further complicated by disparities between training and actual job duties. It has been estimated that police officers spend 75-90% of their duty time in noncrime-related activities. Among them are mediating interpersonal conflicts and functioning as helping persons. Only 10-20% of their duty time is crime-related. However, 90% of their training in law enforcement deals with crime work. Even though only 10% or less of their training focuses on service-related tasks, that occupies 75-90% of their duty time, bringing them into constant contact with an oftentimes unsympathetic public:

> "The image of the "cop" is not created exclusively by the officer (Undercuffler, 1980). An identity is assigned to them the moment they pin on the badge. That image may be a stereotype, outdated, and inaccurate; nevertheless, it is the one the public has of law enforcement officers and believes. Police officers do not have to accept it. They can, instead, change it or even develop their own and live by that more realistic one. Police officers are told, and end up accepting, that they are marriage counselors and

> should investigate and resolve successfully family conflicts, and help the couple resolve the conflict and "live happily ever after." They are supposed to be paramedics and save the dying. They are supposed to be super sleuths and solve all cases. Although they can see how absurd those expectations are, they frequently run the risk of ending up believing them. If they are supposed to do all these things and do them well, is it surprising that they insist that they need no help when they have personal problems; that they can manage by themselves? Yet, no matter how successful they are at any or all of the above, they frequently find themselves in the no-win situation of someone always disapproving of what they are, do, or say.
>
> "New police officers soon discover that many people seem to react to them negatively in an almost automatic manner. The person wearing the uniform or behind the badge is not seen as an individual but rather as an amalgam of symbols. . . . The reasons behind these reactions to the uniformed officers include political, interpersonal, ethnic, racial, and socioeconomic factors as well as past experiences with other members of the police and exposure to the media, which has portrayed officers from the saviors of mankind to corrupt and evil members of society. Further, the officers are seen as the immediate representation of incarnation of the broader law enforcement system as well as of the criminal justice one. They can and are associated inevitably with the weakness of the system and criticized for it."

Silva, *The Delivery of Mental Health Services to Law Enforcement Officers, Critical Incidents*, 335, 338. With these discrepancies and contradictions, with the double messages, and with the undermining of authority and self-image, it can be understood why police work is one

of the ten most stressful occupations in the world, and why the possibility of burnout is highly significant and the help of mental health professionals is essential. Silva at 338.

A mentally healthy, stable police force is a prime asset of a community. Encouraging officers to seek qualified professional help when needed contributes to preservation of that asset and elimination of the liability inevitably resulting from inattention to officer stress, anxiety, anger, and depression. Such encouragement fosters the important societal goal of preventing civil rights abuses and other unlawful, tortious misconduct at the hands of over-stressed, anxiety-ridden or otherwise troubled law enforcement personnel.

Since these societal interests are left unserved by the absence of or impediments to effective psychotherapeutic treatment, society has a concomitant interest in promoting the availability and effectiveness of psychotherapy, which is the treatment of mental and emotional disorders through the use of psychological techniques designed to encourage communication of conflicts and insight into problems, with the goal being personality growth and behavior modification. *American Heritage Dictionary*, 1463 (3d ed. 1992). This interest would itself be served through recognition of the privilege. *United States v. D.F.*, 857 F. Supp. 1311, 1320 (D.C. Wis. 1994). The psychotherapist's capacity to help her patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult, if not impossible, for her to function without being able to assure her patients of confidentiality and, indeed, privileged communication. *Zuniga*, 714 F.2d at 638. The very essence of psychotherapy is confidential personal revelations about

matters which the patient is and should be normally reluctant to discuss. The process involves a prying into the most hidden aspects of personality, a prying which discloses matters theretofore unknown even to the conscious mind of the patient. Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 184-85 (1960). In psychotherapy, the patient reports whatever goes through her mind. She is required to say everything that comes into consciousness, no matter how ridiculous or inappropriate it may sound. Such communications often involve highly personal matters, the disclosure of which would frequently be embarrassing to the point of mortification. *Jaffee*, 51 F.3d at 1356, *citing In re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992). Nonetheless, therapy demands that the patient talk about everything and anything that occurs to her, without restraint and without any attempt to produce a logical, meaningful discourse. Slovenko at 186. Consequently, what the therapist hears is not a simple recitation of facts relating to an incident or series of incidents, but a commingling of fact, feelings, fears, and fantasies.

There is a danger of misinterpretation and erroneous conclusion if such statements are simply accepted at face value. Dunning points out, for example, that in police critical incident responses, guilt is a common factor. It would not be unusual for the officer to blame himself or herself for the outcome of the event. "If only . . ." and "I should have . . ." are frequently expressed comments after a traumatic incident. Rather than being construed as survivor's guilt, a mental injury, others may accept such statements as admissions of wrongdoing. Dunning, *Mitigating the Impact of Work Trauma: Administrative Issues Concerning Intervention, Critical Incidents*, 73, 77.

If the therapist takes notes or generates records relating to these communications, these may contain not only a patient's actions and statements, but also impressions of a patient which the therapist gains during interviews or therapy sessions, tentative conclusions which the therapist draws, and techniques which he feels might be advisable in the future. While these may be nothing more than working aids to assist the therapist in serving the patient, the layman, i.e. juror, upon reading these materials or hearing them recited may well conclude that they represent final conclusion and uncontroverted facts. *See* Note, *The Social Worker-Client Relationship and Privileged Communications*, 1965 Wash. U. L.Q. 362, 383 (1965).

For therapy to succeed, there must be trust between patient and therapist. The patient's communications to the therapist originate in a confidence that they will not be divulged. McGuire, Graves, & Glaw, *Depth of Self-Disclosure As A Function of Assured Confidentiality and Videotape Recording*, 64 J. Counseling & Development 259, 262 (1985). The inviolability of that confidence is essential to achievement of the purpose of the relationship. Slovenko, at 186. In the absence of that trust, patients will not disclose information necessary for treatment. Empirical studies have suggested that laws that limit the privacy of particular types of "confessions" may discourage certain patients from being candid in the first place, (*See* Taub & Elwork, *Researching the Effects of Confidentiality Law on Patient's Self-Disclosures*, 21 Prof. Psych.: Res. & Prac. 72, 74 (1990)), and that clients' understandings of the limits of confidentiality may influence their willingness to self-disclose regarding behaviors or experiences considered serious or extreme;

once informed that there are limits to the confidentiality of the therapeutic relationship, clients may engage in less self-disclosure. Nowell & Spruill, *If It's Not Absolutely Confidential, Will Information Be Disclosed?*, 24 Prof. Psych.: Res. & Prac. 367, 369 (1993). Lower courts have taken note. In *Jennings v. D.H.K. Airlines*, 101 F.R.D. 549, 550-551 (N.D. Ill. 1984), for example, District Judge Marshall acknowledged, ". . . Had (the plaintiff) known that (the psychologist) might be required to disclose her confidences in a lawsuit . . . her trust in (the psychologist) doubtless would have diminished."

The need for this inviolable trust is especially pronounced in the case of law enforcement personnel steeped in a culture that creates a "suspiciousness and distrust characteristic" (*See* Fuller, *An Overview of the Process of Peer Support Team Development, Critical Incidents*, 99, 101) and includes, all too often, administrative non-responsiveness to psychological injury:

> ". . . Most administrators are wary of any discussion that suggests job-related duties and conditions might produce psychological injury to workers. The protective services have generally believed that their selection and training process produces individuals who can adapt well under stressful conditions, and in fact, that stress can bring out the best in a worker. . . Manifestation of injuries are viewed as an individual responsibility, not one that relates to the supervision of personnel deployed in a special operation. Where bulletproof vests are universally regarded as preventive safety equipment and firearms certification as preventive training against the possible injury of a bullet wound during the performance of duty, no thought or planning is generally afforded mental injuries that might result from the incident. Yet such

injuries are just as much the result of the shooting event as any flesh wound."

Dunning, *Mitigating the Impact of Work Trauma: Administrative Issues Concerning Intervention, Critical Incidents* 73, 74-75.

2. The privilege protects an individual's right of privacy.

An individual's right of privacy has been characterized as a ". . . fundamental tenet of the American legal tradition . . . ," protected by common law, statutory provisions, and the Constitution. 98 Harv. L. Rev., *supra*, at 1544.[6] This Court has recognized that an individual's interest in privacy includes an interest in controlling the dissemination of private information about himself/herself. Communications made by patients to psychotherapists implicate this privacy concern. The Constitution also recognizes the general interest of individuals in the privacy of confidential communications. The test is whether an individual justifiably relied on an "expectation of privacy." The patient-psychotherapist relationship meets that test, since psychotherapy requires that patients fully disclose extremely personal and sensitive information. Compelled disclosure of information communicated by a patient to a psychotherapist will therefore often threaten the privacy of the patient's most intimate thoughts. 98 Harv. L. Rev., *supra* at 1545-1547.

[6] In addition to the authorities discussed in the article, eight states include references to a right of privacy in their respective constitutions: Alaska Const. Art. I, §22, Ariz. Const. Art. II, §8, Cal. Const. Art. I, §1, Fla. Const. Art. I, §23, Haw. Const. Art. I, §7, Ill. Const. Art. I, §§6, 12, La. Const. Art. I, §5, Mont. Const. Art. II, §10. Wisconsin's Constitution mandates that the state shall treat crime victims with respect for their privacy. (Art. I, §9m.) These and other states also provide statutorily for a right of privacy, either in general (Wis. Stat. Ann. §895.50) or in specific contexts (Neb. Rev. Stat. §81-673, Me. Rev. Stat. Ann. tit. 34-B, §3003 (healthcare/mental health); Okla. Stat. 21, §839.1, N.Y. Civ. Rights Law §50, Neb. Rev. Stat. §20-202 (use of name or picture without consent); Me. Rev. Stat. Ann. tit. 17-A, §§432, 483 (computer privacy); Minn. Stat. Ann. §198.33 (residents of veterans homes, searches and seizures); Ala. Code §13A-11-30, et seq., Me. Rev. Stat. Ann. tit. 17-A, §511, S.D. Codified Laws §22-21-1, Utah Code Ann. §76-9-401 et seq. (eavesdropping and communications)).

The psychotherapist-patient relationship has been compared more readily with that between priests (and other clerics) and penitents than doctors and patients. It is, by its nature, more intimate, personal, and private than the physician-patient relationship; patients will seek medical treatment even if there is a risk of disclosure since there is little chance of stigmatization in being treated by a general practitioner. Domb, *I Shot the Sheriff, But Only My Analyst Knows: Shrinking the Psychotherapist-Patient Privilege*, 5 J. L. & Health 209, 214 (1990); *See also* Comment, 23 Washburn L.J., 706, *supra*, at 708. On the other hand, self disclosures made to psychotherapists share common characteristics with confidential communications uttered within the confessional or spoken to a rabbi or minister. This was obviously the view of the Judicial Conference in proposing Rules 504 and 506. The Advisory Committee specifically noted that the definition of "confidential" communication in Rule 506(a) coincided with the use of the term in Rule 504 (a)(3), explaining that, ". . . Many clergymen now receive training in marriage counseling and the handling of personality problems. Matters of this kind fall readily into the realm of

the spirit. The same considerations which underlie the psychotherapist-patient privilege of Rule 504 suggest a broad application of the privilege for communications to clergymen." 26 Wright & Graham, *Fed. Prac. & Proc.: Evid.* at 9-10 (1992) (the Advisory Committee's Notes are reproduced in their entirety).

Just as a penitent's privacy is protected in confessing his sins and transgressions and seeking spiritual healing, a patient's privacy in laying bare his entire self, his dreams, his fantasies, his sins, and his shame (*See Zuniga*, 714 F.2d at 638) in quest of healing through psychotherapeutic treatment is likewise entitled to protection.

Contrary to Petitioner's suggestion, there is no inherent bias favoring defendants in civil litigation who seek protection of their privacy through claim of privilege. (*See* Pet. Br. at 38, 39 (". . . it is better to preserve this . . . remedy than provide secret counseling for those who . . . have violated the Constitution.")) Instead, as *Jennings v. D.H.K. Airlines*, *supra*, demonstrates, plaintiffs likewise need, and would be entitled, to protect their privacy in this manner as well. 101 F.R.D. at 550, 551.

3. Experience with the privilege has been favorable.

All fifty states have recognized the need for and have adopted varying forms of the psychotherapist-patient

privilege. 51 F.3d at 1356.[7] This widespread recognition of the privilege at the state level is strong evidence that experience with the privilege has been favorable. *Id.* at 1357, citing *In re Doe*, 964 F.2d at 1328. This Court has taken note of state privilege laws in determining whether to extend a privilege in light of reason and experience in the federal system. *United States v. Gillock*, 445 U.S. 360, 368 n.8 (1980); *Trammel v. United States*, 445 U.S. 40, 48-50 (1980). A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy. *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981).

---

[7] Ala. Code §34-26-2; Alaska Stat. §8.86.200; Ariz. Rev. Stat. §32-3283; Ark. Code Ann. §17-39-107; Cal. Bus. & Prof. Code §1012; Colo. Rev. Stat. §13-90-107; Conn. Gen. Stat. Ann. §52-146q; Del. Code Ann. Title 24 §3913; D.C. Code §14-307; Fla. Stat. Ann. §90.503; Ga. Code Ann. §24-9-21; Haw. Rule 504.1; Idaho Code §54-3213; Idaho Evid. Code §9-203; Ill. 225 ILCS 20/16; Ind. Code §25-23.6-6-1; Iowa Code §622.10; Kan. Stat. Ann. §65-6315; Ky. Rule of Evid. 507; La. Code of Evid. 510; Me. Rev. Stat. Ann. tit. 32, §7005; Md. Code Ann. §9-121; Mass. Gen. Laws Ann. ch 112 §135A; Mich. Stat. Ann. §18.425(1610); Minn. Stat. Ann. §595.02(g); Miss. Code Ann. §73-53-29; Mo. Ann. Stat. §337.636; Mont. Code Ann. §37-22-401; Neb. Rev. Stat. §71-1,335; Nev. Rev. Stat. §49.215, 225, 235; N.H. Rev. Stat. Ann. §330-A:19; N.J. Rev. Stat. §45:15BB-13; N.M. Stat. Ann. §61-31-24; N.Y. Evid. Code §4508; N.C. Gen. Stat. §8-53.7; N.D. Evid. Code §503; Ohio Rev. Code Ann. §2317.02; Okla. Stat. 59 §1261.6; Or. Evid. Code §40.250; Pa. Cons. Stat. tit. 23 §6116; tit. 42 §5945.1; R.I. Gen. Laws §5-37.3-3, 4; S.C. Code Ann. §19-11-95; S.D. Codified Laws §36-26-30; Tenn. Code. Ann. §63-11-213; Tex. Rules Civ. Evid. 510; Utah Code Ann. §58-60-114; Vt. Rule Evid. 503; Va. Code Ann. §8.01-400.2; Wash. Rev. Code §18.19.180; W. Va. Code §30-30-12; Wis. Stat. §905.04; Wyo. Stat. §33-27-123.

While it is true, as Petitioner has pointed out, (Pet. Br. 31-38) that state statutory provisions allow for exceptions, this is no justification to avoid recognition of an appropriate rule when, as here, compelling reasons warrant application of the rule. Proposed Rule 504, which Petitioner proffers as her preferred alternative, itself contained exceptions in subpart (d). Furthermore, given the balancing that is required under the privilege rule at bar, the court has preserved the ability and responsibility of the lower courts to deal appropriately, in the interests of justice, with exceptional situations.

4. Clinical social workers are psychotherapists. There is no rationale today for excluding their patients from the protection of the psychotherapist-patient privilege.

Petitioner's argument regarding "appropriate limits" that would exclude clinical social workers from coverage (Pet. Br. 39, 40) is not realistic. It totally ignores the developments that have occurred within the interrelated mental health care professions and the delivery of mental health services over the past two decades. When proposed Rule 504 was developed in the early 1970's, the social work profession was in its early adolescence. Social work was largely generic—all social workers were trained to perform functions such as casework, group work, community organization, and administration. Although trained as caseworkers, only few social workers were trained as psychotherapists. Clinical social work was in its infancy and not even recognized as a separate specialty within the profession. Psychotherapy was not

considered a function of social work. Only eleven states licensed or certified social workers.[8]

Since that time, however, the role of clinical social workers has developed as their training and functioning have expanded. Today, the greatest proportion of psychotherapeutic services are delivered by clinical social workers working in every type of mental healthcare facility and in private practice. Clinical social workers are the predominant providers of mental health services in facilities serving the underprivileged and in rural areas. (*See* Brief Amici Curiae of the National Association of Social Workers *et al.*, pp. 5-7, and authorities cited therein.) Their training and education have evolved to include in-depth study of cognitive, psychological, and social development and major theoretical explanations of personality development. *Id.*, at p. 11; *see also*: 98 Harv. L. Rev., *supra*, at 1550. All fifty states, as well as Puerto Rico and the Virgin Islands, have some form of regulation of clinical social work practice.[9] Illinois law, for

---

[8] Cal. Bus. & Prof. Code, §4990 *et seq.*; Ill. Rev. Stat. Ann. ch. 225, para 20/1 *et seq.* (Illinois); La. Rev. Stat. Ann. §37:2701 *et seq.*; Me. Rev. Stat. Ann. tit. 32 §7001 *et seq.*; Mich. Stat. Ann. §18.425 (1601); N.Y. Educ. Law §7700 *et seq.*; Okla. Stat. 59 §1250 *et seq.*; R.I. Gen. Laws 5-39.1-2; S.C. Code Ann. §40-63-10; Utah Code Ann. §58-60-201 *et seq.*; Va. Code Ann. §54.1-3700 *et seq.*

[9] See n. 8, *supra*; Ala. Code §34-30-1 *et seq.*; Alaska Stat. §.08.95.010; Ariz. Rev. Stat. 32-3291 *et seq.*; Ark. Code Ann. §17-39-101 *et seq.*; Colo. Rev. Stat. §12-43-401 *et seq.*; Conn. Gen. Stat. Ann., §20-195m *et seq.*; Del. Code Ann. tit. 24 §3901 *et seq.*; D.C. Code Ann. §2-3308.1 *et seq.*; Fla. Stat. Ann. § 491.002 *et seq.*; Ga. Code Ann. §43-10A-1 *et seq.*; Haw. Rev. Stat. §467 D-1 *et seq.*, 467 E-1 *et seq.*; Idaho Code §54-3201 *et seq.*; Ind. Code §25-23.6-1-1 *et seq.*; Iowa Code Ann. §154C.1 *et seq.*; Kan. Stat. Ann. §65-6301 *et seq.*; Ky. Rev. Stat. Ann.

(continued...)

example, defines clinical social work practice as ". . . the providing of mental health services for the evaluation, treatment, and prevention of mental and emotional disorders in individuals, families, and groups based on knowledge and theory of psychosocial development, behavior, psychopathology, unconscious motivation, interpersonal relationships, and environmental stress." An individual cannot obtain a license to practice clinical social work until he or she passes an examination and has completed either (a) a master's degree in social work and 3,000 hours of satisfactory supervised clinical experience, or (b) a doctoral degree in social work and 2,000 hours of satisfactory supervised clinical experience. 225 ILCS 20/3, 20/9.

The increased role of clinical social workers is likewise reflected in Congressional action. Licensed or certified social workers are recognized as "licensed health professionals" under 42 U.S.C. §1395i-3(b)(5)(G) and 42 U.S.C. §1396r(b)(5)(G). Clinical social worker services are in-

---

[9] (...continued)
§335.010 *et seq.*; Md. Code Ann. Health Occ. §19-101 *et seq.*; Mass. Gen. Laws Ann. ch. 112 §130 *et seq.*; Minn. Stat. Ann. §148B.01 *et seq.*; Miss. Code Ann. §73-53-1 *et seq.*; Mo. Ann. Stat. §337.600 *et seq.*; Mont. Code Ann. 37-22-101 *et seq.*; Neb. Rev. Stat. §71-1, 295 *et seq.*; Nev. Rev. Stat. §641B.010 *et seq.*; N.H. Rev. Stat. Ann. §330-A:1 *et seq.*; N.J. Rev. Stat. §45:15BB-1 *et seq.*; N.M. Stat. Ann. §61-31-1 *et seq.*; N.C. Gen. Stat. §90B-1 *et seq.*; N.D. Cent. Code §43-41-01 *et seq.*; Ohio Rev. Code Ann. §4757.01 *et seq.*; Or. Rev. Stat. Ann. §675.510 *et seq.*; Pa. Stat. Ann. tit. 63, §1901 *et seq.*; S.D. Codified Laws §36-26-1; Tenn. Code Ann. §63-23-101 *et seq.*; Tex. Hum. Res. Code Ann. §50-001 *et seq.*; Vt. Stat. Ann. tit. 26, §3201; Wash. Rev. Code 18.19.010 *et seq.*; W. Va. Code §30-30-1 *et seq* Wis. Stat. §457.01 *et seq.*; Wyo. Stat. §33-38-101 *et seq.*; P.R. Laws Ann. tit. 20, §821 *et seq.*; V.I. Code Ann. tit. 27, §531 *et seq.*

cluded within the term "medical and other health services" under 42 U.S.C. §1395x(s)(2)(N), are defined under 42 U.S.C. §1395x(hh)(2) as ". . . services performed by a clinical social worker . . . for the diagnosis and treatment of mental illnesses . . . which the clinical social worker is legally authorized to perform under State law . . . of the State in which such services are performed as would otherwise be covered if furnished by a physician or as incident to a physician's service," and are included under 42 U.S.C. §1395l(a)(1)(F) among those services reimbursable from the Federal Supplementary Medical Insurance Trust Fund.

Hence, Petitioner's argument that any privilege extending to patients of licensed or certified clinical social workers is per se overbroad lacks merit. To alleviate any concern whether a particular therapist or counselor is a bona fide mental health care provider, courts may look to the possession of educational degrees, licenses, minimum number of hours of training, or affiliation with a licensed institution. *See* 98 Harv. L.Rev., *supra*, at 1551; *See also*, Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 Cal. L. Rev. 1050, 1058, (1973). Congress used this approach.[10] The Adviso-

---

[10] 38 U.S.C. §7402(b)(9) (To be eligible to be appointed a social worker position under the Veteran's Health and Administration Act, person must hold a master's degree in social work from an approved college or university, and satisfy the social work license, certification, or registration requirements, if any, of the State in which the social worker is to be employed.) *See also* 42 U.S.C. §1395x(hh)(1) ("Clinical social worker" possesses a master's or doctor's degree in social work, has performed two years of supervised clinical work, is licensed or certified by the (continued...)

ry Committee had used a similar approach in formulating the definition of "psychotherapist" in proposed Rule 504(a)(2)(B). (". . . a person licensed or certified . . . under the laws of any state or nation, while similarly engaged.") Courts may also consider whether the particular health care provider's profession utilizes internal controls and ethical rules, as in the case of clinical social workers. (*See* Brief Amici Curiae of the National Association of Social Workers, *supra*, at 13. *See also*: Note, 1965 Wash. U. L.Q., *supra*, at 382.)

Furthermore, refusal to include communications with mental health providers such as clinical social workers within the protection of the privilege would result in unequal protection of the law for persons who require psychotherapy and cannot afford to hire a psychologist or psychiatrist. Wealthy persons have the luxury of choosing any therapist they wish, regardless of discipline. Many others, however, including those who are dependent upon community health centers or employee assistance programs, have little or no choice. Psychotherapy treatment may be provided by psychiatrists, psychologists, or clinical social workers. The patient's need for psychotherapy, and his or her disclosures in psychotherapy, will be identical irrespective of the discipline of the therapist. To declare a privilege for those people who can afford psychiatrists and psychologists, and refuse one for those who must obtain treatment from other mental health care providers such as clinical social workers,

---

[10] (...continued)
State in which services are performed or, if no licensure or certification is provided, has completed two years or 3,000 hours of post-master's degree supervised clinical practice.)

would deprive the poor or less-wealthy of a legal protection available to those who could afford to pay for it. 98 Harv. L. Rev., *supra*, at 1551; 10 Pac. L.J., *supra*, at 818; 61 Cal. L. Rev., *supra*, at 1061.

II.

THE SEVENTH CIRCUIT CORRECTLY APPLIED THE PRIVILEGE UNDER THE FACTS AND CIRCUMSTANCES OF THE PRESENT CASE.

It is undisputed that Karen Beyer was at all relevant times a licensed clinical social worker in the State of Illinois and a certified employee assistance counselor. (App. 18) She received her master's degree in social work from Loyola University of Chicago. In addition, she is a graduate of the two-year Family Therapy Training Program of the Family Institute of Northwestern University. As of mid-1992, she had had twelve thousand hours of experience in individual, family, and marital psychotherapy, and she provided clinical supervision in psychotherapy for doctoral psychology students from six graduate psychology programs. (App. 41, 42); 51 F.3d at 1350, n. 3. The only conversations or contact she had with Officer Redmond since June 27, 1991 were in her professional capacity through the Employee Wellness Program of the Village of Hoffman Estates, providing confidential psychotherapeutic counseling services to the officer. (App. 18, 36)

Though Petitioner urges that "crucial evidence would be excluded" by extending the psychotherapist-patient privilege to these confidential communications (Pet. Br. 21), the Seventh Circuit correctly determined that the evidentiary need to disclose the content of those post-shooting counseling sessions and Beyer's notes and

records was vastly outweighed by the officer's privacy interests.

The federal issue posed by this case is whether Officer Redmond's use of deadly force under the facts and circumstances was objectively reasonable. (App. 8, 9) In *Graham v. Connor*, 490 U.S. 386 (1989), this Court explained that the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, making allowance for the fact that police officers may be forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary. The "reasonableness" inquiry is conducted without regard to underlying intent or motivation. Evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force, nor would an officer's good intentions make an objectively unreasonable use of force constitutional. 490 U.S. at 396, 397.

Here, the officer never interjected her own state of mind as an issue into the case. Petitioner, however, relentlessly pursued state-of-mind issues. For example, Petitioner insisted on inquiring into "a relationship problem" which, according to Beyer's compelled deposition testimony, Officer Redmond mentioned during counseling. (App. 70, 71.) Assuming arguendo there was some "relationship problem" in Redmond's life, the objective reasonableness test of *Graham* excludes consideration of any such underlying motivation for her actions. Petitioner continuously pushed for disclosure, even though the counseling communications between the officer and Ms. Beyer went well beyond any purely factual discussion of the incident and delved, instead, into numerous subjects which had absolutely nothing to do with the shooting itself and which were, in good measure, of a highly personal nature. (*See* R. 111, pp. 23, 46; R. 119-4, pp. 14-15.)

The Petitioner's purported "need" for access to the content of the counseling sessions and the resultant notes to test the credibility of Redmond's memory is contrived, not genuine. Petitioner has grossly distorted the record in representing that Officer Redmond claimed that her memory of the shooting was better at trial than it had been shortly after the incident. (Pet. Br. 21) In actuality, Ms. Redmond was responding to a far narrower inquiry dealing only with her recollection of how she was holding her gun. (App. 141, 142)

Petitioner had at her disposal other readily available, less intrusive means of testing the veracity of the officer's account of the shooting. For example, Redmond had prepared a draft police report on the date of the occurrence. She completed it the next day. This report was produced to plaintiff in discovery, and counsel utilized it in cross-examining the officer at trial. (App. 148-150) The officer had also been orally interviewed by one of her superiors that same day. The interview was transcribed and also produced to plaintiff's counsel during discovery. He likewise utilized it in cross-examining Redmond at trial. (App. 140-143, 149) Counsel had a 324 page transcript of the officer's deposition testimony to utilize.[11] Lastly, Petitioner's counsel had available to him numerous eyewitnesses whose accounts could serve as a further check on the officer's recounting of events. Petitioner put

---

[11] This does not include the additional 100 pages that was generated as a result of the District Court's April 14, 1992 order. (R. 73, 117-1.)

four of these witnesses, all siblings of the decedent, on the stand. (R. 165 at pp. 34-95; R. 166 at pp. 102-149, 167-223, 250-295.)

There is no evidence of record to show that Officer Redmond's version of the occurrence itself ever changed in any material respect. There was never any denial on the officer's part that she had, in fact, fired the single shot that killed Ricky Allen. She so stated in her report, in her statement to then-Sgt. Syre, in her answer to Petitioner's Complaint (App. 13), and in her testimony. (App. 96) The "crucial importance" which plaintiff attaches to Ms. Beyer's testimony that at one point in time during counseling, Ms. Redmond "could not remember pulling the trigger" (Pet. Br. 22) is thus illusory. Petitioner's parenthetical note that Redmond denied this at trial is another mischaracterization. (App. 101) Furthermore, Ms. Beyer's compelled deposition testimony revealed no material factual discrepancies. (R. 111 at pp. 40-43, 47-49.) Her trial testimony demonstrated that Redmond and she did not discuss all of the factual details of the shooting during counseling. (App. 113, 121)

Petitioner has not, and cannot, point to anything of substance in the record to buttress her current suggestion that Ms. Beyer had somehow "enhanced", "rehearsed", or "synthesized" Redmond's factual recollection of the incident. (Pet. Br. 22-23, 25) Though given the opportunity by the district court to query Ms. Beyer at length, at least with respect to any discussion of the facts of the incident, Petitioner utterly failed to develop any factual basis for equating these counseling sessions with "phoneying-up" and "parroting". (Pet. Br. 22, n. 29.)

Officer Redmond clearly held a justifiable expectation of privacy. Under Illinois law, she, as a patient, and

Karen Beyer, as her therapist, had a privilege to refuse to disclose and to prevent the disclosure of her record or communications. 740 ILCS 110/10. Given the strong policy of comity between state and federal sovereignties, where a state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule. *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981). Here, the district court defeated that expectation by employing a mechanistic reading of Rule 501 which failed to account adequately for reason and experience. The Seventh Circuit corrected that error.

CONCLUSION

Respondents respectfully request that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

GREGORY E. ROGUS, ESQ.
Counsel of Record
PAUL E. WOJCICKI, ESQ.
ROBERT E. WILENS, ESQ.
JENNIFER L. KELLY, ESQ.
SEGAL MCCAMBRIDGE SINGER & MAHONEY, LTD.
Two First National Plaza
20 South Clark Street, Suite 700
Chicago, IL 60603

RICHARD N. WILLIAMS, ESQ.
Corporation Counsel
VILLAGE OF HOFFMAN ESTATES
1900 Hassell Road
Hoffman Estates, IL 60195

Attorneys for Respondents